I have not seen the Will or the Trust Deed."

"Certain events in the hospital were narrated by a witness, an inmate in the hospital. This witness Chang Ah Ngiun (PW4) .... occupied adjacent beds with the deceased and is not in any way connected with the family.

Her evidence as to the substance of the conversation was:—

'I heard that the property was to be held in trust by the defendant. In the event of her death the property would be distributed to the grandchildren. *They spoke* in Hokkien. I understand Hokkien.'

She added she had seen the defendant as well as her husband in the hospital *and had overheard* a particular conversation between the deceased and the defendant, the substance of which is as follows:—

'She told the defendant in the event of her death she was to distribute the properties. Ang Jin Ang's son should be given a share because Ang Jin Ang was poor. She told the defendant don't try to deceive the grandchildren — Touch my heart.'

According to PW4....

'Certainly I will do it. I hope you will recover. God be with you.'

In cross-examination she said:—

'The grandmother and PW3 (the granddaughter) talked together this matter *many times* and she cried'."

What has PW3 to say of this:—

"My grandmother told me these things ... *on two occasions* and I was alone with her.

On one occasion defendant and her husband was there in the hospital. She said the Trust Deed was given to defendant. In event of her death defendant was asked to distribute the property according to the Trust Deed. If she recovers, she asked for return of the Trust Deed."

"Q. *The 2nd occasion* how long after the 1st?

A. When she was in the hospital more than a month." (The italics are mine).

With respect, after correctly deciding where the onus lay, the learned judge misdirected himself in respect of the following matters:—

(1) The validity of the adoption of respondent No. 1.

(2) The inadmissability of the evidence contradicting the consideration stated in the Memoranda and the observations of the magistrate in regard thereto in Ex. P2.

(3) The evidence in support of the trust was wholly hearsay and unreliable in the light of the failure to adduce any evidence as to the execution of the Will or Trust.

(4) No reason was given for rejection of, or reference made to, the evidence of Lam Teng Kui, Chief Clerk in Yong & Wong & Co. as to execution of the Memoranda and his further evidence that the deceased knew what she was doing and had not mentioned any trust or asked him to prepare a trust deed (or a will for that matter) when it was at her instructions that he prepared the Memoranda of Transfer, and

(5) Whether the plaintiff had *proved* the trust.

Expressions of intention are not enough. Equity will not perfect an imperfect trust. Is a trust established? Hearsay and oral evidence is all that was before the court. The Statute of Frauds applies to Sarawak (See *Chin Yuk Hon* v. *Chop Koong Oon*[2] *per* Lascelles J.).

As is said in *Halsbury's* Laws of England (3rd Edition), Vol. 38, Section 1388 at page 830: —

"A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his Will."

I accordingly am of the opinion that the respondents had failed to prove the existence of a trust and would dismiss the claim with costs here and in the court below. The deposit will be refunded to the appellant.

Suffian L.P. concurred.

Appeal allowed.

Solicitors: *Yong & Co.; Battenberg & Talma.*

CHEAH TEONG TAT v. HO GEE SENG & ORS.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F. JJ.) April 26, 1975]

[Penang — Federal Court Civil Appeal No. 133 of 1973]

Practice and Procedure — Appeal — Application for extension of time to serve notice of appeal — Special circumstances — Ignorance of procedural law not sufficient material for exercise of discretion — Subordinate Court Rules, 1950, Order XXXIX rule 2.

This was an appeal from the dismissal by Syed Agil Barakbah J. of the appellant's application for extension of time to serve a notice of appeal from a judgment entered against him in the Sessions Court ([1974] 1 M.L.J. 31). The judgment against the appellant in the Sessions Court was entered on May 6, 1972. He filed a notice of appeal in that court on May 11, 1972 but did not serve a copy of such notice on the respondents or their solicitors. The appellants subsequently applied for extension of time to serve the notice of appeal but this was dismissed in the High Court. On appeal,

Held (Wan Suleiman J. dissenting) dismissing the appeal: (1) sub-rules (1)(3) and (6) of Rule 2 of Order XXXIX of the Subordinate Court Rules, when read together, provide that an appeal from the decision of a subordinate court must be brought by way of a notice of appeal in Form 39 which must be filed in the court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors;

(2) the learned judge was right in finding that no case had been made out for the granting of extension of time to serve the notice of appeal on the respondents.

Cases referred to:-

(1) *Ahmad bin Yahya & Anor.* v. *Ahmad bin Sulaiman* [1972] 2 M.L.J. 109.

(2) *Chong Kuen Ying & Ors. v. Louis Lavagna* [1972] 1 M.L.J. 180.

(3) *Gatti* v. *Shoosmith* [1939] 1 Ch. 841; [1939] 3 All L.R. 916.

(4) *In re Coles and Ravenshear* [1907] 1 K.B. 1.

(5) *Krishnasamy & Ors.* v. *D.C. Batler-Madden* [1947] M.L.J. 182.

(6) *John Puddicombe Wilkins & Ors.* v. *John Patrick Kenlm Wilkins* [1951] M.L.J. 80.

(7) *Liew Chee Tat* v. *Loke Moon & Ors.* [1972] 2 M.L.J. 29.

(8) *New India Assurance Co. Ltd.* v. *Karam Singh* Muar Civil Appeal No. 1 of 1970.

(9) *Law Yee Wah & Anor.* v. *Poh Koh and Sons Realty Sdn. Bhd.* [1974] 2 M.L.J. 29.

(10) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 229.

FEDERAL COURT.

Lim Ewe Hock for the appellant.

A. Jayadeva for the respondents.

Gill C.J. (Malaya): This is an appeal from the dismissal by Syed Agil Barakbah J. of the appellant's application for extension of time to serve a notice of appeal from a judgment entered against him as defendant in an action by the respondents as plaintiffs in the Sessions Court, Sungei Patani.

The procedure as regards appeals from a Sessions Court to the High Court is laid down in Order XXXIX of the Subordinate Court Rules 1950. Rule 2 of that Order provides as follows:—

"2. (1) Appeals to the High Court shall be brought by giving notice of appeal in Form 39.

(2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The court appealed from shall thereupon supply to the appellant, upon payment of the fee therefore, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.

(4) As soon as the certified copy is ready, the court shall notify the appellant.

(5) Within 14 days from the receipt of the notification, the appellant shall, unless the court for sufficient cause otherwise orders —

(a) deposit in the court appealed from a sum which in the opinion of the Registrar will cover the cost of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and

(b) lodge in the court appealed from a sum of one hundred and fifty dollars, or such lesser sum as the court may in any case direct, by way of security for the costs of the appeal.

(6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected."

The notice of appeal in Form 39 under sub-rule (1) is required to be addressed to the Registrar of the Sessions Court and to the respondent or respondents, being the person or persons directly affected by the appeal.

The judgment against the appellant in the Sessions Court was entered on May 6, 1972. He filed a notice of appeal in that court on May 11, 1972, but he did not serve a copy of such notice on the respondents or their solicitors. On the same day he applied for a certified copy of the notes of evidence in the case. He was supplied with the grounds of judgment and the notes of evidence on June 29, 1972, and informed by letter that if he wished to proceed with the appeal he was to deposit in the Sessions Court within 14 days a sum of $50 to cover the cost of preparing a sufficient number of copies of the appeal record and a further sum of $150 as security for the costs of the appeal, failing which he would be barred from proceeding with the appeal. On July 4, 1972 he consulted a firm of solicitors as to whether he would have any chance of success in pursuing the appeal. On being advised that he had good merits in the appeal, he retained the firm of solicitors to act for him.

On July 6, 1972 his solicitors sent a sum of $200 as requested by the Registrar of the Sessions Court, together with a notice of their appointment as solicitors for the appellant. On the same day they wrote to the respondents' solicitors forwarding by way of service a copy of the notice of their appointment as solicitors as well as a copy of the notice of appeal. By their letter of July 9, 1972 the solicitors for the respondents gave notice to appellant's solicitors that at the hearing of the appeal they would apply for the appeal to be dismissed on the ground that the notice of appeal had not been served on them, as required by O.39 r.2(6), within the time limited for the filing of the notice of appeal in court. Thereupon the appellant made the application for extension of time, from the dismissal of which this appeal has been brought to this court.

In dismissing the appellant's application, the learned judge followed his decision in the earlier case of *Ahmad bin Yahaya & Anor.* v. *Ahmad bin Sulaiman*[1] in which he had held that ignorance of the procedural law did not constitute sufficient material upon which he could exercise his discretion to enlarge the time where the appellant had failed to comply with the provisions of O.39. He had further held in that case that it was necessary for the applicant to show special circumstances to enable the court to exercise its discretion and not sufficient merely to show that the proposed appeal had merits. In the course of his judgment in that case the learned judge had construed the meaning of r.2(6) of O.39 thus: —

"Although no time limit within which the appellant has to serve a copy of such notice is expressly provided in sub-rule (6), by virtue of rule 3(1) of the same Order, it can safely be implied that the appellant has to do so within the same period as provided for filing such notice in the court appealed against, i.e. within fourteen days within which such decision was pronounced. That such is the intention of the legislature is clear because it is only after the appellant has complied with the requirements of rule 2 which includes sub-rule (6) that the court appealed against is bound to prepare all the necessary records as required under rule 3(1) after which notice that such records are ready will be served on the appellant by the said court."

That decision of the learned judge was upheld by this court in Federal Court Civil Appeal No. 81 of 1972.

The learned judge also relied on the decision of this court in *Chong Kuen Ying & Ors.* v. *Lovis Lavagna*[2] in which reference was made to the English case of *Gatti* v. *Shoosmith*.[3] He further considered the decisions in *In re Coles & Ravenshear*,[4] *Krishnasamy & Ors.* v. *D.C. Butler Madden*[5] and *John Puddicombe Wilkins & 2 Ors.* v. *John Patrick Kenlm Wilkins*.[6] His attention was also drawn to the case of *Liew Chee Tat* v. *Loke Moon & Ors.*[7] in which the notice of appeal had been served on the respondents one month and seven days after the last day prescribed for it to be filed in court. No application for extension of time having been made, counsel for the appellant argued that such service of notice of appeal on the respondents was valid in law as there were no restrictions imposed upon the appellant as regards such service by O.39 r.2(6). Sharma J. rejected that argument and dismissed the appeal. In doing so he declined to exercise his discretion in favour of the appellant who was reluctant to own his mistake. In the earlier unreported case of the *New India Assurance Co. Ltd.* v. *Karam Singh*[8] (Muar Civil Appeal No. 1 of 1970) in which notice of appeal was served on the respondent fourteen days after what was said to be the last day of service, however, Sharma J. had held that it had been served on the respondents within a reasonable

time. Nevertheless, His Lordship's later decision in *Liew Chee Tat's* case would seem to indicate that he interpreted Order 39, rule 2(6) to mean that service on the respondent or respondents must be effected within the same period as the period limited for the filing of the notice of appeal in court by Order 39, rule 2(3).

Coming now to the present appeal before us, it is founded on six separate grounds of appeal. The main ground, however, is that as rule 2(6) of O.39 does not expressly stipulate the time within which the notice of appeal must be served on the respondent, it is open to the appellant to serve it within a reasonable time. The authority cited for this proposition is the judgment of Wan Suleiman J. in *Law Yee Wah & Anor.* v. *Poh Koh & Sons Realty Sdn. Bhd.*[9] in which it was held that service of a notice of appeal on the respondents some 25 days after the last day for filing such notice of appeal in court was sufficiently speedy and that an application for extension of time for such service was unnecessary. I am constrained to say with respect that I find myself unable to agree with that judgment. I agree with respect with the judgment of Syed Agil Barakbah J. in *Ahmad bin Yahaya and Anor.* v. *Ahmad bin Sulaiman*[1] and with his reasons for that judgment which I have cited above. As I have already said, that judgment was upheld by this court.

In my judgment, R.2(6) of O.39 should not be read in isolation but in conjunction with R.2(3). It must also be read together with Form 39 as prescribed by R.2(1), which, as I have pointed out, is addressed to the court appealed from and the respondent or respondents. Sub-rules (1), (3) and (6) of Rule 2 of Order 39, when read together, provide that an appeal from the decision of a Subordinate Court must be brought by way of a notice of an appeal in Form 39, which must be filed in that court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors. I do not think an appeal can come into existence without the notice of appeal being filed in court, as well as a copy of it being served on the respondent within the prescribed period. I agree that the two acts cannot be done simultaneously, but I am of the opinion that they must be done within the same period.

It has been argued on behalf of the appellant that the intention of O.39 is to give the appellant an opportunity to decide whether or not to carry on with the appeal after he has obtained copies of the notes of evidence and the grounds of judgment. I must say that I can read no such intention into that order. The question of the preparation of the appeal records etc. cannot arise until after an appeal comes into existence.

The other grounds of appeal do not call for serious consideration, as the learned judge quite rightly found that no case had been made out for the granting of extension of time to serve the notice of appeal on the respondents.

I would therefore dismiss this appeal with costs.

Ong Hock Sim F.J.: I have read the judgments of the learned Chief Justice and my brother Wan Suleiman F.J.

It is true that Order XXXIX Rule 2(6) does not prescribe specifically a period of time for service of the notice of appeal. I am of the opinion that it is implicit that the notice of appeal should be served "within the like period" as is provided in Order XXXIX Rule 2(3) for filing the notice of appeal, that is, "within 14 days from the day on which the decision was pronounced." Form 39 is addressed to "The Registrar Sessions Court" and to the parties directly affected by the appeal. A reading of Order 59 Rule 2(1) and (2) of the Rules of the Supreme Court would support this inference. There seems no good ground why a simple Notice of Appeal should not be filed within that period — which may account for no express provision being made that the act may be done "within such extended time as the High Court may allow" as is done for filing of the memorandum of appeal [See Order 59(2)(1)].

I respectfully agree therefore with the Chief Justice that this appeal be dismissed with costs.

Wan Suleiman F.J.: The learned judge, in dismissing this appellant's application followed his earlier decision in *Ahmad bin Yahaya & Anor.* v. *Ahmad bin Sulaiman.*[1]

The application was for an order that the applicant be granted leave to serve a copy of the notice of appeal on the respondent *notwithstanding that the time reserved to serve such a copy has expired.* (The italics are mine).

It is clear that the applicant did not in that decision raise the point that the time for service had lapsed, having assumed that it had indeed lapsed.

Nevertheless Syed Agil Barakbah J. considered this point, and said:

> "Although no time limit within which the appellant has to serve a copy of such notice is expressly provided in sub-rule (6), by virtue of rule 3(1) of the same Order, it can safely be implied that the appellant has to do so within the same period as provided for filing such notice in the court appealed against, i.e. within fourteen days within which such decision was pronounced. That such is the intention of the legislature is clear because it is only after the appellant has complied with the requirements of rule 2 which includes sub-rule (6) that the court appealed against is bound to prepared all the necessary records as required under rule 3(1) after which notice that such records are ready will be served on the appellant by the said court."

The main ground advanced in support of the application was ignorance of procedural law. His Lordship, on this point, ruled ... "I do not consider ignorance of the procedural law to constitute sufficient material upon which I can exercise my discretion in his favour on the principle laid down in *Ratnam* v. *Cumarasamy & Anor.*[10] Secondly, it is not enough by merely showing that the proposed appeal has merits without also showing there are special grounds for the court to exercise its discretion." His Lordship in consequence dismissed the application.

On appeal to the Federal Court, the only two grounds argued were:—

(1) the learned trial judge erred in law in not concluding that "rules of procedure should be the handmaiden, not the master," in the circumstances of the present case when the appellant's appeal had merits and

(2) the learned trial judge erred in law in not holding that having regard to the simple background of the appellant ignorance of procedural law could constitute special grounds for allowing the application.

The issue of construction of O.39 R.2(6) was not raised.

I have been informed by the Registrar that no written grounds of judgment was issued by the Federal Court in that appeal, so that one is unable to say whether their Lordships considered the abovementioned question of construction at all.

I have given what I have held in the case of *Law Yee Wah & Anor.* v. *Poh Koh & Sons Realty Sdn. Bhd.*[9] much thought, and I can find no reason to justify any modification to the conclusions I have expressed therein.

There is much to say for the argument raised in support of the application i.e. that this rule had the object of allowing an appellant, after receiving the grounds of decision, to decide whether he is going to proceed with the appeal. [See O.39 R.2(5)].

Though service of the notice of appeal on the respondents was effected some 45 days after the last date for its filing in court, the notes of evidence and grounds of judgment were supplied to appellant only about a week before that. In the circumstances I would hold that service had been effected on respondents with all convenient speed, and that no question of extension of time for doing so arises.

I would, with respect allow the appeal with costs.

Appeal dismissed.

Solicitors: *Lim, Lim & Oon; Jayadeva & Zahir.*

RE WAN KEE CHEONG, DECD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) April 26, 1975]

[Ipoh — Federal Court Civil Appeal No. 102 of 1974]

Wills Ordinance, 1959, ss. 12 and 16 — Revocation of Will by subsequent marriage — Revival of Will — Whether material that testator know that the Will had been revoked.

This was an appeal from the decision of Wan Hamzah J. ([1975] 1 M.L.J. 150). The testator had made his Will on August 8, 1952 in which he appointed his wife, Cheong Saw Yong as the sole executrix and trustee of his Will. Subsequently his wife died and the testator married the 4th respondent. After the said marriage the testator made codicils to the Will and after making alterations to the legacies he said "In all other respects I confirm my said Will". The question which arose was whether the Will and the two codicils could be admitted to probate. Wan Hamzah J. held that it was clear that the testator intended that his Will would be operative and it was immaterial whether he knew that the Will had been revoked by his marriage. He therefore decreed probate in respect of the Will and the two codicils. On appeal,

Held, dismissing the appeal: the effect of the execution by the testator of the first codicil in 1964 was to revive his Will of 1952 which had been revoked by his marriage in 1964 and the learned judge was therefore quite right in admitting the Will and codicils to probate.

Cases referred to:-

(1) *In the goods of Steele* (1865-9) 1 P. & D. 575.

(2) *Re Taylor* [1938] 1 All E.R. 586.

(3) *McLeod* v. *McNab* [1891] A.C. 471.

(4) *In re Pearson* [1963] 1 W.L.R. 1358.

(5) *In the estate of Marden* [1944] P. 101.

(6) *In the goods of Davies* [1952] P. 279.

FEDERAL COURT.

N. T. Rajah (*Bachan Singh* with him) for the first and second appellant.

Phillip Leong for the first and second respondents.

W. S. W. Davidson for the third and fourth respondents.

M. Sivalingam for the first intervener.

G. Moganasundaram for the second intervener.

Gill C.J. (Malaya): This is an appeal from an order of Wan Hamzah J. admitting to probate the will and two codicils to the said will made by Wan Kee Cheong deceased of Ipoh.

The testator made his will on August 8, 1952, appointing his wife Cheong Sau Yoong as the sole executrix and trustee of his will. Under his will, after making certain pecuniary legacies to his wife Cheong Sau Yoong, to each of his daughters Wan Sek Choon, Wan Wai Choon, Wan Thye Choon, Wan Chiew Choon, Wan Poh Choon, Wan Choi Koon and Wan Chooi Weng and to each of his sons Wan Kah Chan alias Wan Kar Chan and Wan Kah Keong alias Wan Kar Keong, he left the residuary estate to his wife Cheong Sau Yoong (4 shares), to his son Wan Kah Chan alias Wan Kar Chan (3 shares) and to his son Wan Kah Keong alias Wan Kar Keong (3 shares).

The testator's wife Cheong Sau Yoong died on May 11, 1963. On September 4, 1964 the testator married one Loke Yen Thye. On October 15, 1964 he made his first codicil to his will. Under it, after reciting that his wife Cheong Sau Yoong named in his will as the sole executrix and trustee had died, he appointed his eldest daughter Wan Sek Choon, his sixth daughter Wan Choi Koon and his eldest son Wan Kah Chan alias Wan Kar Chan to be the executors and trustees of his will in place of the said Cheong Sau Yoong deceased. In all other respects he confirmed his will and directed his executors and trustees to pay Loke Yen Thye, his second lawful wife, a legacy in the sum of $5,000 in cash immediately upon his death and a sum of $150 monthly commencing two weeks after his demise for her monthly maintenance and household expenses until the distribution of his estate, unless she led an unchaste life or remarried and chose to leave his house.

On March 28, 1972 the testator made a second codicil to his will, under which he directed his trustees to hold his immovable and real property known as and situate at No. 85 Jalan Ampang, Kampar and held under Certificate of Title No. 2691 for Lot No. 850 in the town of Kampar, together with all income therefrom, in trust for his wife Loke Yen Thye. The testator died on April 1, 1972.

The order appealed from was made in a probate action which was commenced by Wan Chooi Kin alias